

Navigating the “PayFac” Era: Rules, Regulations, and Electronic Payment Processing Requirements

September 16, 2020



Today's Topics

- Understanding the Payment Facilitator model
- Understanding Visa/Mastercard rules and their impact on collection payments
- Understanding the rules and regulations controlling convenience fees, surcharges, and service charges
- Understanding electronic payment requirements

Today's Featured Speaker

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- 30+ years of experience
- Winner of 2019 International Compliance Officer of the Year
- Including roles as general counsel, chief lobbyist, executive vice president and CEO of ACA International
- She leads Ontario Systems' compliance products, services, and consulting initiatives
- Nationally recognized presenter and consultant on CFPB-related compliance topics
- Recognized nationally for her advocacy work on behalf of the credit and collection industry



Disclaimer

This information is not intended to be legal advice and may not be used as such. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, however, nor should it be used to replace the advice of your own legal counsel. Any opinions expressed are the opinions of the speaker and not their organization.

Remembering Days Past: State of Card Processing 2014

Acceptance of Credit Cards by Collection Agencies (Formerly Fastfax #9510)

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Updated Feb. 6, 2014

- **Key Takeaways From Day's Past:**
 - Visa and Mastercard's (VM) bylaws suggested their cards cannot be used for the repayment of debts. (Note also, balance transfer programs)
 - Many agencies were denied Merchant status by acquiring banks and VM
 - Small amount of case law on this subject has stated it is not a violation of the FDCPA to accept credit card payments.
 - Charging processing fees became popular as an income source

Remembering Days Past: Caselaw

Key Takeaways From Key Decisions of Day's Past:

Lewis v. ACB Business Services, Inc. (S.D. Ohio 1996)

- Fee presented to consumer as a payment option. Amount would not be paid to ACB or any entity it controlled and was a standard fee charged by the processor of the payment, an independent entity”

Lee v. Main Accounts, Inc. (6th Cir 1997)

- Lawful for debt collection agency to pass on 5% surcharge assessed by processor

... and then came the Payment Facilitator

Payment Facilitator

- Provides infrastructure necessary for their sub-merchants to begin accepting card payments:
 - They underwrite and onboard the sub-merchants, and provide technology for sub-merchants to process electronic payments and receive the funds from those payments
- See, Visa/Mastercard Payment Facilitator Rules, 2020 at <https://usa.visa.com/dam/VCOM/global/support-legal/documents/visa-payment-facilitator-model.pdf>

Participants in the Payment Facilitator Model

Merchant

- Describes the relationship established by a direct contract between a Merchant and an Acquirer or between a Sponsored Merchant and a Payment Facilitator containing their respective rights, duties, and obligations for participation in the Acquirer's Visa or Visa Electron Program.

Participants in the Payment Facilitator Model

SubMerchant

- **Sub-merchants (merchant in the traditional model)**

Businesses onboarded by a payment facilitator to start accepting electronic payments.

- physical storefronts accepting card-present transactions, or
- online businesses accepting card-not-present transactions
- Sub-merchant must be underwritten and onboarded to payment facilitator's infrastructure
- Limit on the original \$1 Million in transactions no longer in effect for processing because the transaction limits at which time a submerchant must apply for Merchant status have increased to from \$100,000 to \$1,000,000 dollars U.S. Visa has also increased the time within which the submerchant may apply for Merchant status is now two years. But the reason for my comment that the transaction limits have been relaxed such that a Pay Fac may continue to process payments is because of the following:

- Must sign a direct merchant agreement with an acquirer when annual Visa sales exceed US \$100,000 (See Footnote 4) (**sponsored merchant can maintain payment facilitator relationship for payment services**).

Footnote 4: In the AP Region (Australia, Hong Kong, India, New Zealand), Canada Region, Europe Region, US Region: USD 1 million

Additional Participants in Payment Facilitator Model

Acquiring Banks:

- Payment facilitator must enter into an agreement with an acquiring bank or payments institution, licensed by the card networks.

Processors:

- Along with the acquiring bank, a relationship with a processor is necessary to operate as a payment facilitator. The processor is responsible for processing and settling the transactions that are initiated by the payment facilitator's sub-merchants.

Relationship: Acquiring Bank — Payment Facilitator— Processor

PARTICIPANT	KEY RESPONSIBILITIES	PROGRAM ELIGIBILITY
Acquirer	<ul style="list-style-type: none"> • Contracts with a payment facilitator to enable sponsorship of merchants. • Monitors compliance of payment facilitator in accordance with the Visa Rules. • Conducts due diligence of payment facilitator and ensures proper due diligence occurs during the signing of sponsored merchants. 	<ul style="list-style-type: none"> • Must be in good standing in all Visa risk management programs in order to sponsor payment facilitators. • Must meet the minimum risk rating standards and minimum equity requirement of US \$100 million required by Visa.¹
Payment Facilitator	<ul style="list-style-type: none"> • Contracts with an acquirer to provide Visa payment services to sponsored merchants. • Contracts with sponsored merchants to enable Visa payment acceptance. • Monitors compliance of sponsored merchant activity in accordance with the Visa Rules. • Receives settlement of transaction proceeds from the acquirer on behalf of the sponsored merchant. 	<ul style="list-style-type: none"> • Must be located within the acquirer's jurisdiction.² • Cannot be listed on the Terminated Merchant File (TMF), or similar files. • Cannot act as a sponsor for another payment facilitator, marketplace or other entities outlined in the Visa Rules.
Sponsored Merchant	<ul style="list-style-type: none"> • Contracts with a payment facilitator. • Sells products and services to Visa cardholders. • Accepts Visa products as payment. 	<ul style="list-style-type: none"> • Must meet certain MCC restrictions on participating as a sponsored merchant.³ • Must sign a direct merchant agreement with an acquirer when annual Visa sales exceed US \$100,000⁴ (sponsored merchant can maintain payment facilitator relationship for payment services). • Must be located within the acquirer's jurisdiction. • Cannot be listed on the TMF, or similar files.

⁴ In the AP Region (Australia, Hong Kong, India, New Zealand), Canada Region, Europe Region, US Region: USD 1 million.

Understanding Days Present: State of Card Processing 2020

Regulatory Framework

- Card Brand (Visa Mastercard) Rules (April 2020)
- Fair Debt Collection Practices Act (Third-party debt collectors)
- Unfair Deceptive or Abusive Acts and Practices Section of Dodd Frank
- CFPB Guidance Bulletin
- State electronic payment restrictions
 - Convenience Fees
 - Surcharges
 - Third-party processor charged fees (e.g. MA)
- Many agencies and businesses still lack infrastructure to qualify for Merchant status
- No change in case law - not a violation of the FDCPA to accept card payments
- ***Agencies charging fees in connection with a card payment may violate merchant agreements as well as FDCPA and state law***

FDCPA Prohibitions

- **15 USC 1692f § 808. Unfair practices**

- A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) ***unless such amount is expressly authorized by the agreement creating the debt or permitted by law.***

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- **15 USC 1692e§ 807. False or misleading representations**

- A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:...

- (2) The false representation of --(A) the character, amount, or legal status of any debt;

- Enforced by: Federal Trade Commission; Consumer Financial Protection Bureau; Courts

Evolution of Case Law

Quinteros v. MBI Associates (E.D.N.Y. 2014)

- Debt collector's assessment of a \$5 processing fee on credit card payments was a violation of the FDCPA

Lindblom v. Santander Consumer USA (E.D. Cal. 2015)

- Claim against Western Union under FDCPA for collection of processing was fee dismissed at pleading stage; court said it would call for an unprecedented expansion of the definition of a debt collector

So, what does this mean to you?

Parties need to stay in their swim lanes

There is no insurance more effective than which is achieved by maintaining clear lines of responsibility between all parties

State Sur Charge Law

A surcharge, also known as checkout fee, is an extra fee charged by a merchant/seller when receiving a payment by check, credit card, charge card or debit card which at least covers the cost to the merchant of accepting that means of payment, such as the merchant service fee imposed by a credit card company.

BANNED	LAWFUL BUT RISKY
Colorado	California
Connecticut	New York
Kansas	Texas
Maine	Florida*
Massachusetts	

Card Brand Convenience Fee Rules for Merchants/PayFacs

- Charged for a bona fide convenience in the form of an alternative payment channel outside the Merchant's customary payment channels and not charged solely for the acceptance of a Card;
- Added only to a Transaction completed in a Card-Absent Environment;
- Not charged if the Merchant operates exclusively in a Card-Absent Environment
- Charged only by the Merchant that provides goods or services to the Cardholder
- Added only to a domestic Unattended Transaction, excluding Transactions at Automated Fuel Dispensers, Telephone Service Transactions, or ATM Disbursements
- Applicable to all forms of payment accepted in the payment channel;
- Disclosed clearly to the Cardholder: As a charge for the alternative payment channel convenience;
- Before the completion of the Transaction, the Cardholder must be given the opportunity to cancel;
- A flat or fixed amount, regardless of the value of the payment due;
- Included as part of the total amount of the Transaction and not collected separately;
- Not charged in addition to a surcharge;
- **Not charged on a Recurring Transaction or an Installment Transaction (See update Jan 2020)**
- Surcharging is not allowed

Let's Review: Definition of Recurring Transaction

- Visa Master Card Rules prohibit any Merchant from charging a convenience fee on a Recurring Transaction
- Recurring Transaction is defined as:

Recurring Transaction	<p>A Transaction in a series of Transactions that use a Stored Credential and that are processed at fixed, regular intervals (not to exceed one year between Transactions), representing Cardholder agreement for the Merchant to initiate future Transactions for the purchase of goods or services provided at regular intervals.</p> <div><div>ID# 0025041</div><div>Edition: Apr 2020 Last Updated: Oct 2017</div></div>
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Let's Review: Recurring Payment Prohibitions

<p>Installment Transaction</p> <p>Test: With regard to charging a Third- Party Processor Charged Fee, who is the Merchant?</p>	<p>Effective through 24 January 2020 A Transaction in a series of Transactions that use a Stored Credential and that represent Cardholder agreement for the Merchant to initiate one or more future Transactions over a period of time for a single purchase of goods or services.</p> <p>Effective 25 January 2020 A Transaction in a series of Transactions that represents Cardholder agreement for the Merchant to initiate one or more future Transactions over a fixed period of time (not to exceed one year between Transactions) for a single purchase of goods or services, or the repayment of a single Debt.</p> <p>ID# 0024724</p> <p>Edition: Apr 2020 Last Updated: Apr 2020</p>
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Additional Definitions – Stored Credential, Payment Credential

Stored Credential	<p>Information (including, but not limited to, a Payment Credential) that is stored by a Merchant or its agent, a Payment Facilitator, or a Staged Digital Wallet Operator to process future Transactions.</p> <div><div>ID# 0029547</div><div>Edition: Apr 2020 Last Updated: Apr 2020</div></div>
Payment Credential	<p>A number or other credential that identifies an account of a Cardholder for use in a Transaction.</p> <div><div>ID# 0030658</div><div>Edition: Apr 2020 Last Updated: New</div></div>

Convenience Fees, Third-Party Processor Charged Fees and Surcharges

- Merchants and sub-merchants are ***legally permitted*** to charge consumers a convenience fee to process credit and debit card payments.
- Third-party debt collectors represent the only category of merchant or sub-merchant who cannot charge consumers a convenience fee to process payments
- Third-party processor charged fee model is a business model whereby the payment facilitator charges consumers a convenience fee to process credit and debit card payments.
- Third-party processor owns all decision rights regarding the amount of the convenience fee.

Issue #1: Third-Party Processor Charged Fee Model

- Do the Visa/Mastercard rules (VM Rules) permit a Payment Facilitator to charge a convenience fee to process the consumer's credit card or debit card payment?
 - **Visa Mastercard Rules (VM) place conditions on a Merchant's ability to charge a convenience fee:**
 - Fee can only be charged for a bona fide convenience in the form of an alternative payment channel outside the Merchant's customary payment channels; and
 - Fee may not be charged solely for the acceptance of a Card

Issue #2: Third-Party Processor Charged Fee Model

- Do the VM Rules or any other law or regulation prohibit or restrict the amount of the convenience fee charged by the Payment Facilitator?
 - **Visa Mastercard Rules do not place conditions on the amount a Merchant may charge for a convenience fee**
 - **CFPB requires the fee amount to be reasonable (undefined term)**
 - **Visa Mastercard Rules require the amount of the convenience fee charged by a Merchant to be a flat fee***

*Visa Mastercard Rules allow Service Providers to charge a convenience fee equal to a flat fee or a percentage of the payment

Issue #3: Third-Party Processor Charged Fee Model

- Do the Visa Mastercard Rules permit Merchants to charge a flat convenience fee amount on each payment in a recurring payment arrangement?
 - **As of January 2020, the Visa Mastercard Rules prohibit a Merchant from charging a flat convenience fee amount on each payment in a recurring payment arrangement.**
 - **Interpretation: Convenience fee may be charged only on the first payment in the series. [Consult with your legal counsel]**
 - **Rule applies to secured payment arrangements, preauthorized electronic funds transfers and preauthorized credit card transactions. N/A unsecured payment arrangements.**

Electronic Payments

- Credit cards
 - Single payments
 - Multiple payments
 - Evidence ????????????????
- Preauthorized electronic funds transfer payments [What types do you accept?]
 - Single payments
 - Evidence?
 - Recurring payments
 - Payment arrangement more than one payment
 - Evidence ?

The Electronic Funds Transfer Act

- Preauthorized electronic fund transfer – requires consumer to sign or similarly authenticate the authorization [
- Copy of such authorization shall be provided promptly to the consumer [within 24 hours]
- FDCPA post dated payment reminders must be provided per payment [third- party debt collector]
- If preauthorized transfers vary in amount or timing, the financial institution or designated payee shall, prior to each transfer, provide reasonable advance notice to the consumer [different requirement than FDCPA post dated payment notice]
- Oral stop payment - notify payee orally or in writing at any time up to three business days preceding the scheduled date of such transfer.
- Written stop payment - Payee may require written confirmation to be provided to it within fourteen days of an oral notification if, when the oral notification is made, the consumer is advised of such requirement and the address to which such confirmation should be sent.

Obtaining Authorization

- An authorization is valid if it is readily identifiable as such and the terms of the preauthorized transfer are clear and readily understandable.
- Similarly authenticated standard permits signed, written authorizations to be provided electronically.
- The writing and signature requirements of this section are satisfied by complying with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., which defines electronic records and electronic signatures.

Authorization Contents

- When processing **RECURRING** Electronic Funds Transfer VIA Bank Account Transaction or Debit Card Transaction the following pieces of information must be included in the authorization:
 - (1) Express authorization language (“I authorize Company A to debit my account”);
 - (2) The amount of each transaction;
 - (3) The effective date of each transaction;
 - (4) The consumer’s financial institution;
 - (5) The consumer’s account number;
 - (6) The consumer’s financial institution’s routing number (not applicable if you use a debit card); and
 - (7) Revocation language for the purpose of recurring payments only.
- “In order to stop payment on any payment in the series or the entire series of payments; you must call our business office at least three business days prior to the date of the payment(s) to notify us of this change in the payment arrangement.”
- (If varying amounts or timing changes), information on receipt of future notice

How to Obtain Authorization – According to the CFPB

November 2015 Guidance Bulletin

- One or more entities did not violate EFTA or Regulation E merely because they *obtained by telephone* consumer authorizations that were signed or similarly authenticated by the consumer orally and recorded.
- Regulation E may be satisfied if a consumer authorizes preauthorized EFTs by entering a code into their telephone keypad, or, supervision concluded, the company records and retains the consumer's oral authorization, provided in both cases the consumer intends to sign the record as required by the E-Sign Act.
- Do not need to satisfy more burdensome requirements of E-Sign when obtaining authorization.
- Retain documents and recordings for a minimum of two years after the date of the last transfer/payment.

The Copy to the Consumer

- The person that obtains the authorization shall provide a copy to the consumer either electronically or in paper form.
- Copy should reasonably match the information given to the consumer when the preauthorized funds transfer was authorized.
- **IF YOU SEND THE COPY OF THE AUTHORIZATION ELECTRONICALLY YOU MUST FIRST COMPLY WITH THE E-Sign Act.**

The E-Sign Act- What is it, and Why We Need to Comply

- The E-Sign Act provides parties with the ability to provide an electronic signature for documents that would otherwise have to be signed with ink and paper methods. It is also the law Congress passed to make clear digital documents and properly executed contracts have the same force and effect as paper and pen.
- E-Sign also contains an often-overlooked section which addresses when and how one may substitute the digital delivery of a consumer disclosure for traditional types of delivery such as hand delivery, certified mail or the U.S. postal service.

E-Sign Act – The Law

c) Consumer Disclosures.--(1) Consent to electronic records.-

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever [[Page 114 STAT. 465]] is required) such information satisfies the requirement that such information be in writing if –

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent;

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement pertaining to the consumer's rights and as further provided in the Electronic Signatures in Global and National Commerce Act (E-Sign).

E-Sign Act – The Law

- Prior to obtaining consumer consent to send a information mandated by statute or regulation:
 - Indicate whether customers have a right or option to receive information on paper
 - Identify whether the consent relates to a particular transaction
 - Explain consumer's right to withdraw consent, provide the procedures to withdraw consent and the consequences of withdrawing consent re: fees, termination of the relationship
 - Describe the procedures the consumer may use to update their contact information
 - Outline the hardware and software requirements for accessing and retaining records
 - Explain how to obtain paper disclosures after consent has been given and describe any associated fees

Consumers must also consent electronically, or electronically confirm consent, in a manner that reasonably demonstrates their ability to receive or access the information electronically.

Questions?



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ADDITIONAL RESOURCES

Card Brand Rules – Charging Fees

ISSUE	CONVENIENCE FEE	SERVICE FEE	SURCHARGE
Who may assess the fee?	<p>Visa: Merchant only (Rule 5.6.2.1, Table 5-6)</p> <p>MasterCard: Merchant only (Rule 5.11.2)</p>	<p>Visa: A merchant, third party, or acquirer (Rule 5.6.3.1)</p> <p>MasterCard: N/A.</p>	<p>Visa: Merchant only (Rule 5.6.1.7)</p> <p>MasterCard: Merchant only (Rule 5.11.2.3)</p>
What kind of merchants may assess this fee?	<p>Visa: Not limited by rule</p> <p>MasterCard: Not limited by rule</p>	<p>Visa: Limited to only certain MCCs (e.g., schools, government entities, court costs such as child support) (Rule 5.6.3)</p> <p>MasterCard: N/A.</p>	<p>Visa: Not limited by rule</p> <p>MasterCard: Not limited by rule</p>
On what kind of cards can it be assessed?	<p>Visa: Credit or debit (Rule 5.6.2.1)</p> <p>MasterCard: Credit or debit (Rule 5.11.2)</p>	<p>Visa: Credit or debit (Rule 5.6.3.1.)</p> <p>MasterCard: N/A.</p>	<p>Visa: Credit only; not debit (Rule 5.6.1.7)</p> <p>MasterCard: Credit only (Rule 5.11.2)</p>

Card Brand Rules – Charging Fees

ISSUE	CONVENIENCE FEE	SERVICE FEE	SURCHARGE
Can the fee be charged in a card present environment, card absent environment, or both?	<p>Visa: Card absent only (Rule 5.6.2.1)</p> <p>MasterCard: Both. May be charged if the fee is imposed on all like transactions regardless of the form of payment used (Rule 5.11.2)</p>	<p>Visa: Both (Rule 5.6.3.1)</p> <p>MasterCard: N/A.</p>	<p>Visa: Both (Rule 5.6.1.7)</p> <p>MasterCard: Both. (Rule 5.11.2.2)</p>
Fixed amount or variable amount?	<p>Visa: Fixed only</p> <p>MasterCard: Not specified</p>	<p>Visa: Flat, fixed, banded, or ad valorem</p> <p>MasterCard: N/A.</p>	<p>Visa: May be either fixed or variable (Rule 5.6.1.5, 5.6.1.6)</p> <p>MasterCard: Not specified. A surcharge is “any fee” charged by a merchant for the use of a card. (Rule 5.11.2)</p>

Card Brand Rules – Charging Fees

ISSUE	CONVENIENCE FEE	SERVICE FEE	SURCHARGE
What are the limits on the amount of the fee that can be charged?	Visa: Not specified MasterCard: Not specified	Visa: Must be a reasonable reflection of costs associated with completing the transaction (Rule 5.6.3.1) MasterCard: N/A.	Visa: No greater than the applicable Merchant Discount Rate MasterCard: Must be limited to the lesser of the Maximum Surcharge Cap or the average merchant discount rate over the last one or twelve months, at the merchant's option. (5.11.2.1)
What kind of customer disclosure is required?	Visa: Fee must be clearly disclosed to customer as a charge for convenience of method of payment, with option to cancel the transaction without penalty (Rule 5.6.2.1, Table 5-6) MasterCard: Not specified	Visa: Fee must be clearly disclosed to customer as a charge for convenience of method of payment, with option to cancel the transaction without penalty (Rule 5.6.3.1) MasterCard: N/A.	Visa: Disclosures required at point of entry and point of sale of (1) the exact amount or percentage of surcharge; (2) surcharge is assessed by the merchant only to credit transactions; and (3) surcharge is not greater than the applicable Merchant Discount Rate (Rule 5.6.1.7 and Table 5-5) MasterCard: Disclosure at POI or POS must contain: (1) amount of surcharge; (2) that surcharge is not greater than merchant discount rate; and (3) that surcharge is imposed by Merchant. (Rule 5.11.2.3)

E-Sign Act and Impact on Validation Notice – 1692 g

§ 1692. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Impact of E-Sign on Post Dated Checks

§ 15 U.S. Code § 1692f . **Unfair practices**

(a) Notice of debt; contents

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.
- (2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

E-Sign and The Electronic Funds Transfer Act

VIII. Other Requirements

Preauthorized Transfers—12 CFR 1005.10

- Preauthorized transfers from a consumer's account may only be authorized by the consumer in writing and signed or similarly authenticated by the consumer (12 CFR 1005.10(b)).
- Signed, written authorizations may be provided electronically, subject to the E-Sign Act (Comment 10(b)-5).
- In all cases, the party that obtains the authorization from the consumer must provide a copy to the consumer.

Sample Script – Texting and the E-Sign Act

Providing consent to Receive Legal Documents and Disclosures Electronically requires that we follow the Electronic Signatures Act (E-Sign). To ask for this type of consent we are required to provide additional language.

- **Agent:** *Thank you for setting up the payment arrangement. Would you like me to text you a copy of the authorization and the post-dated payment reminders?*
 - **Consumer:** Yes, sounds great.
- **Agent:** *Since these kinds of documents include important disclosures and information about your rights, I need your consent to send them to you by text and a link rather than by US mail.*
 - **Consumer:** Okay
- **Agent:** *Please listen to the following: (Note: this could be accomplished in a prerecorded script the agent plays).*

Sample Script - Texting and the E-Sign Act

Consent to receive legal documents and disclosures electronically means you are providing consent for us to send you legally required information about any of your Active Accounts [insert appropriate descriptors here] by text message including secure links to our company's website using your mobile phone number. You understand you have a right to receive this information in paper form at no charge, withdraw your consent, update your contact information at any time by calling us at [phone number of company or provider] during normal business hours of 8:00 a.m. to 6:00 p.m. Monday through Saturday or by visiting our website at [insert link to appropriate web page] or sending a text message using the keyword revoke to us at XXXXX.

In order to properly give us your consent to receive information, legal documents and disclosures electronically you will need access to a nonwork mobile number which can send and receive text messages including hyperlinks to url addresses [list hardware and software requirements here]. To make sure the information and documents and disclosures will properly reach you, please reply to the text message from our company by simply texting the keyword ESIGN to our company at xxxxx. Text and message rates may apply.

- **Third-Party Debt Collectors:** *Don't forget to include this is a communication from a debt collector.*

Sample Script – E-Mail and the E-Sign Act

Consent to receive legal documents and disclosures electronically means you are providing consent for us to send you legally required information about any of your Active Accounts [insert appropriate descriptors here] by email message including secure links to our company's website using your mobile phone number. You understand you have a right to receive this information in paper form at no charge, withdraw your consent, update your contact information at any time by calling us at [phone number of company or provider] during normal business hours of 8:00 a.m. to 6:00 p.m. Monday through Saturday or by visiting our website at [insert link to appropriate web page].

In order to properly give us your consent to receive information, legal documents and disclosures electronically you will need access to a nonwork email address with [list hardware and software requirements here]. To make sure the information and documents and disclosures will properly reach you, please reply to the email message from our company by simply writing I agree in the body of the email.

- **Third-Party Debt Collectors:** *Don't forget to include this is a communication from a debt collector.*

LaVallee v. Med – 1 Solutions – Impact on Email Communications and E-Sign Act

Lavallee v. Med-1 Solutions, LLC (Case No. 1-15-cv-1922, U.S.D.C., Southern District of Indiana). Court: Validation Notice Sent Via Email Requiring Consumer to Click a Link to Open a “Secure Package” Is Not “Sending” a Validation Notice Under FDCPA for two reasons:

- Link to letter was successfully used to open the letter
- Defendant knew plaintiff never opened the letter
- Lacked E-Sign compliance
- Case was appealed. CFPB filed Amicus Brief
- August 8, 2019 decision rendered by 7th Circuit US Court of Appeals

LaVallee v. Med – 1 Solutions – 7th Circuit Decision

- The court considered if highly secure process used by Med 1 to “send” the validation notice to the plaintiff via email satisfied the compliance requirements of the FDCPA regarding the duty to send the notice
- Court did not opine on E-Sign
- Appeal was based on Med-1’s contention that its emails were initial communications that contained the required disclosures.
- Court held the emails do not qualify under the Act’s definition of “communication” because they did not “convey[] ... information regarding a debt.” 15 U.S.C. § 1692a(2). Nor did the emails “contain” the statutorily mandated disclosures. § 1692g(a).
- At most the emails provided a means to access the disclosures via a multistep online process. Because Med-1 violated § 1692g(a), the judge was right to enter judgment for Lavallee.